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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 3, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Notice of *Ex Parte* Presentation, GN Docket No. 00-185, CS Docket No. 02-52

Dear Madame Secretary:

On January 3,2003, representatives of the Alliance of Local Organizations Against Preemption ("ALOAF'") met with the staff of the Media Bureau and met separately with Jordan Goldstein, Legal Advisor to Commissioner Copps in the above captioned proceeding. Attending the meeting on behalf of ALOAP were: Nicholas Miller & Mitsuko Herrera of Miller & Van Eaton. Attending the meeting on behalf of the FCC Media Bureau were:

- Barbara Esbin, Associate Chief
- Marjorie Reed Greene, Associate Chief
- Mary Beth Murphy, Chief, Policy Division
- John Norton, Deputy Chief, Policy Division
- Kyle Dixon, Deputy Bureau Chief and Special Counsel to the Chairman for Broadband
- Peter Corea, Attorney Advisor, Policy Division
- John Kiefer, Engineering Division
- Alison Greenwald, Engineering Division

As summarized in the attached talking points, the parties discussed: the non-Title VI sources of local franchising authority to require franchise fees for use of the public rights-of-way

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to provide cable modem service; the authority of local franchising authorities under Title VI to require cable modem service providers to comply with local customer service standards; the significant and additional burden placed on the public rights-of-way by the provision of cable modem service; and the implications and limitations of the Commission's tentative decision to classify cable modem service as a Title I information service, and not as a service ancillary to Title II or Title IV services. In addition, the parties discussed: local authority to broadly enforce state consumer protection and anti-fraud provisions; general state property law doctrine as it relates to use of the public rights-of-way; authority of local governments under federal law, state law and home rule doctrines to require compensation and franchises for use of the public rights-of-way by non-cable, non-telecommunications service providers; and the applicability of constitutional and state contract law to existing cable franchise agreement contracts.

Sincerely,

MILLER & VAN EATON, P.L.L.C.

By

Mitsuko R. Herrera

cc w/o attachments: Barbara Esbin, Associate Chief
Marjorie Reed Greene, Associate Chief
Mary Beth Murphy, Chief, Policy Division
John Norton, Deputy Chief, Policy Division
Kyle Dixon, Deputy Bureau Chief and Special Counsel to the Chairman for Broadband
Peter Corea, Attorney Advisor, Policy Division
John Kiefer, Engineering Division
Alison Greenwald, Engineering Division

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Inquiry Concerning High-speed Access to the Internet Over Cable and Other Facilities	GN Docket No. 00-185
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	CS Docket No. 02-52

EX PARTE PRESENTATION
ON BEHALF OF
THE ALLIANCE OF LOCAL ORGANIZATIONS AGAINST PREEMPTION

January 3,2003

Alliance of Local Organizations Against Preemption Members

ALOAP is supported by the Alliance for Community Media ("ACM), the American Public Works Association ("APWA"), the Greater Metropolitan Telecommunications Consortium ("GMTC") and the Texas Coalition of Cities For Utility Issues ("TCCFUI"). The ACM represents public, educational and government access organizations and users. Many of its members (like members of the organizations which comprise ALOAP) are working within local communities to ensure that all community members are able to take advantage of broadband's promise. APWA's members include the engineers and other professionals responsible for designing, building, repairing and monitoring municipal streets and other public infrastructure. The GMTC is a consortium of 28 greater metropolitan Denver, Colorado communities formed to facilitate regulation of telecommunications issues on behalf of their jurisdictions. TCCFUI is a coalition of approximately 110 cities in Texas that have joined together to, among other things, advocate their interests in municipal franchising, municipal right-of-way management and compensation, municipal public utility infrastructure, and other related issues before the Commission, the Texas PUC, the Texas legislature and other fora.

ALOAP is also being supported by individual communities and local government organizations including Alexandria, VA, Austin, TX, Buffalo Grove, IL, Chandler, AZ, Charlotte & Mecklenberg Co., NC, Chicago, IL, Chula Vista, CA, Concord, CA, Denver, CO, Dubuque, IA, Evanston, IL, Fairfax County, VA, Forest Park, Greenhills, and Springfield Township, OH, Fort Wayne, IN, Fort Worth, TX, the Illinois Association of Telecommunications Officers and Advisors, Indianapolis, IN, Irvine, CA, Kansas City, MO, Lake County, IL, Los Angeles, CA, the Metropolitan Area Communications Commission ("MACC"), representing Washington County, and the Oregon cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove, Tigard, and Tualatin, OR, Minneapolis, MN, Minnesota Association of Community Telecommunications Administrators, Miami Valley Cable Authority (OH), Montgomery County, MD, Mt. Hood Cable Commission (OR), Nashville, TN, Newport News, VA, Newton, MA, Niles, IL, Northbrook, IL, Northern Suburban Cable Commission, MN, Olympia, WA, Piedmont Triad Council of Governments representing Alamance County, Caswell County, Davidson County, Guilford County, Montgomery County, Randolph County, Rockingham County and the municipalities of Archdale, Asheboro, Burlington, Eden, Elon, Gibsonville, Haw River, High Point, Jamestown, Lexington, Liberty, Madison, Mayodan, Mebane, Oak Ridge, Ramseur, Randleman, Reidsville, Yanceyville, NC, Phoenix, AZ, Plano, TX, Rockville, MD, San Antonio, TX, The States of California and Nevada Association of Telecommunications Officers and Advisors, Springfield, MO, St. Louis Park, MN, St. Paul, MN, St. Tammany Parish, LA, Tacoma, WA, Takoma Park, MD, the Texas Association of Telecommunications Officers and Advisors, Tucson, AZ, Village of Hoffman Estates, IL, Village of Oak Park, IL, Village of Skokie, IL, Vancouver, WA, Virginia Beach, VA., the Washington Association of Telecommunications Officers and Advisors, and West Allis, WI.

TAB A

Local Governments Are Deeply Concerned About Right-of-way Use.

- ALOAP represents co-sovereign governments
- Local governments must be prepared for any emergency – national, regional or local – and the management, control and maintenance of the public rights-of-way are critical to the nation's emergency management systems.
- Constant disruption to the public rights-of-way creates enormous burdens on local citizens – from traffic delays, to lost business, to vehicle damage, to loss of life and property.
- Local governments have used separate authority under state law and Title VI to:
  - Prevent "redlining" in our communities.
  - Ensure that system construction is adequate to meet the future needs of the community.
  - Ensure that system build-outs occur within reasonable time periods.
  - Enforce consumer protection laws and ensure that subscribers receive quality service at the advertised price.
  - Minimize right-of-way disruption and accidents.
  - Enforce employment anti-discrimination protections.

Cable Modem Service Creates Significant Additional Burdens On the Public Rights-of-Way

- Cable modem service burdens the public right-of-way significantly more than does video-only cable service, because modem service requires a far more elaborate cable system than does video. Among other things, cable modem service requires:
  - Replacing coaxial cable with fiber optic cable to provide cable modem service.
  - Installation of additional and significantly larger power supplies and electronic equipment cabinets.
  - Installation of more nodes and more fiber to provide adequate upstream capacity for non-cable services.
  - Installation of conduit to protect fiber optic cable. The coaxial cable used in traditional cable systems can be buried directly in the ground but fiber optic cable must be protected. Installation of additional conduit can be as burdensome as replacing all the entirety of the coaxial cable plant.
- Much of the extensive construction in the public rights-of-way in the 1990's and continuing today has been necessary to upgrade systems to be able to provide cable modem services.
- If the long-sought "killer app" ever arrives, upstream bandwidth needs could increase sharply, requiring the construction of additional nodes and hubs and even additional small headends
- As small businesses become a growing market for cable modem service, this will require extending networks into parts of communities that often were not served by traditional video networks.

Local Government Right-of-way Franchise Authority Does Not Stem From Title IV.

- Local authority does not depend on an affirmative grant from the federal government particularly as to matters pertaining to the use, occupancy and terms and conditions for use and occupancy of the public rights-of-way. *City of Dallas v. FCC,* 165 F.3d 341 (5th Cir. 1999).
- The Supreme Court has stated that "the cable medium may depend for its very existence upon express permission from local government authorities," *Turner Broadcasting System v. FCC*, 512 U.S. 622,628 (1994) and "[t]he Cable Act left franchising to state or local authorities. . . ." *City of New Yorkv. FCC*, 486 U.S. 57, 61 (1988).
- Courts have recognized that local authority to require right-of-way franchises pre-dates the enactment of Title VI. *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *Nationul Cable Television Ass'n v FCC,* 33 F.3d 66, 69 (D.C. Cir. 1994).

Local Governments Have Authority to Broadly Regulate Cable Operators and Cable Systems Under Title VI.

- Local government regulatory authority under Title VI is not limited to regulation of "cable service." Several provisions of Title VI explicitly permit States and localities to regulate non-cable services.
  - 47 U.S.C. §541(d)(1)(State may require informational tariff for intrastate communications services other than cable services).
  - 47 U.S.C. § 542(h) (fees may be charged for the provision of cable service or other communications service via a cable system by a third party).
  - 47 U.S.C. § 544(b)(1)(facilities requirements may be enforced).
  - 47 U.S.C. § 546(c)(1)(B)(renewal may be denied if the quality of the operator's service, but without regard to the mix or quality of cable service or other services provided over the system, has been reasonable).
  - 47 U.S.C. § 551(applying privacy provisions to any service provided by cable operator, and providing that nothing in the Cable Act prevents a locality from enacting consistent laws for the protection of subscriber privacy).
  - 47 U.S.C. § 554 (local government or locality may enforce EEO requirements).
  - 47 U.S.C. § *552* (locality may establish customer service and buildout schedules of the *cable operator;* consumer protection laws are protected unless "specifically preempted" by the Cable Act).
  - 47 U.S.C. § 542(b) (allowing localities to enforce proposals made by an operator for providing leased access to the cable system to provide services other than video programming services).

Local Governments Have Authority to Require Cable Modem Service to Meet State and Local Customer Service Standards.

- In the NPRM, the Commission properly noted that the consumer protection provision broadly permits a locality to establish "customer service requirements of the cable operator," and not just "customer service requirements related to the provision of cable service." 47 U.S.C. § 552(a).
- Furthermore, the Cable Act states that "nothing in this title" preempts state or local authority to protect consumers of cable modem service, except to the extent "expressly provided" in Title VI. 47 U.S.C. § 552(d). There is no express preemption.
- Section 541(d)(2) – "Nothing in this title shall be construed to affect the authority of any state to regulate any cable operator to the extent that such operator provides any communication service other than cable service _. [on a] private contract basis."
- *The Commission should immediately notify cable operators that cable modem service continues to he subject to local customer service standards.*

Local Governments Have Authority to Require Franchise Fees to Use the Public Rights-of-Way to Provide Cable Modem Service.

- Before 1996, the franchise fee permitted under 47 U.S.C. § 542(b) reached the "cable operator's gross revenues derived...from the operation of the cable system." The Telecommunications Act of 1996 amended that section so that the franchise fee reached the "cable operator's gross revenues derived...from the operation of the cable system *to provide cable services."*
- The legislative history demonstrated that Congress intended, at a minimum to allow localities to require fees on non-cable services as permitted under their general state and local law authority, not to prohibit fees altogether. The law permits localities to continue to charge fees for use of the public rights-of-way to provide non-cable services subject only to limits that apply under 47 U.S.C. § 253(c) to telecommunications services.
- The 1996 Act permits franchise fees on telecommunications services provided by cable operators § 253(c); § 541(b)(3)(A).
- This is the only interpretation that avoids raising significant constitutional issues:
  - The language of the 1996 Act is NOT retroactive. The parties agreed to a level of franchise fees and in return, cities took less in other areas -- PEG payments and I-Nets and other compensatory benefits. To apply it retroactively would create serious takings issues; there is certainly no reason why a local government should be bound to honor the franchise if the agreed compensation is no longer paid.
  - For post-1996 contracts, the parties often agreed precisely to the timing for the change in payments, fully anticipating that the issue might be litigated. There is absolutely no reason for the industry not to live up to these contracts, particularly in light of what the FCC actually ruled.
- *The Commission should clarify that local governments have non-Title VI authority to require franchise fees for cable modem service and to require cable operators to fully comply with franchise agreement contracts.*

The Commission Does Not Have Authority to Regulate Cable Modem Service Under Title I Alone.

- Relying on Title I alone will encourage providers to challenge the Commission's authority to impose universal service and other non-Title I obligations.
- Title I authority is ancillary to Title II, Title III, and Title IV authority.
  - Title 1 of the Communications Act "is not an independent source of regulatory authority." *California v. FCC*, 905 F.2d 1217, 1240 at n. 35 (9th Cir. 1990), *citing United States v. Southwestern Cable Co.*, 392 U S . 157, 178 (1968).
  - *See also FCC v. Midwest Video Corp.*, 440 U.S. 689,706 (1979) ("without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded.").
  - *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) ("[T]he Commission's expansive power under the Act does not include the 'untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority,"' *quoting National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601,617 (D.C. Cir. 1976)).
  - *Turner v. FCC,* 514 F.2d 1354, 1355 (D.C. Cir. 1975) ("[T]he Commission must find its authority in its enabling statutes"); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (striking down Commission rules governing the depreciation of telephone plant that conflicted with state regulations) ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.") *Id.* at 374-75.
- Declaring cable modem service to be neither a telecommunications nor cable service puts the state property law challenges in state courts. Non-utility service providers need to obtain the permission of the public and private property owners to use the respective property.

The Commission Should Mitigate the Negative Short Term Effects of the Cable Modem Order.

- Consistent with the May and October 2002 letters issued by the Consumer Information Bureau, the Commission should clarify that *March Cable Modem Order does not supercede negotiated franchise contract provisions, nor preempt enforcement of state or local consumer protection statutes. including customer service provisions applicable to cable modem service.*
- States prohibit the telephone industry from forcing POTS subscribers to subsidize DSL. *The Commission should not permit the cable industry to compel basic subscribers to subsidize cable modem broadband service.*
- The Commission should *avoid imposing unfunded mandates on local governments.*

TAB B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Inquiry Concerning High-speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

EXECUTIVE SUMMARY & TABLE OF CONTENTS OF THE COMMENTS OF THE ALLIANCE OF LOCAL ORGANIZATIONS AGAINST PREEMPTION

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June 17,2002

SUMMARY

The Alliance of Local Organizations Against Preemption ("ALOAP) is a consortium of national organizations formed to protect the interests of local communities in managing and promoting the development of advanced, broadband communications systems. Its members include the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the National Association of Counties and the National Association of Telecommunications Officers and Advisors.

ALOAP's members collectively represent the interests of almost every municipal or county government in the United States. These local governments all join in urging the Federal Communications Commission to refrain from preempting local authority over cable modem service, as appears to be contemplated by the Notice of Proposed Rulemaking in *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* CS Docket 02-52, released March 15, 2002 (the "NPRM").

ALOAP members act as trustees, owners, and managers of valuable public property, mediators among competing uses of the public right-of-way, economic development agencies in promoting deployment of broadband facilities, users of extensive communications resources, developers and promoters of broadband applications, and regulators of cable systems and cable modem service. This proceeding vitally affects ALOAF' members in all of their roles. Among other things, if localities are prohibited from collecting fees on cable modem service, they will lose approximately $284 million in revenue in 2002 and by 2006 will be losing approximately $500-$800 million in revenue annually. This revenue loss will severely affect local ability to promote development of broadband facilities and encourage development of broadband applications, not to mention numerous other governmental activities.

The Commission has no basis in law or fact to preempt local authority in this proceeding, and any attempt to preempt would raise fundamental constitutional issues under our federal system. More specifically:

- The Commission should not and cannot preclude State and local authorities from regulating cable modem service and facilities in particular ways (NPRM ¶ 98). Local authority to regulate cable modem service is protected by Title VI. Title VI contains some provisions which preempt local authority to regulate cable modem service, but explicitly and implicitly preserves local authority over cable modem service in other regards. Title I does not give the Commission authority to override the local franchising scheme approved by Congress in Title VI. **As** importantly, this proceeding does not just involve "regulation," as the Commission uses that term. When local governments charge fees for use of the public rights of way, or franchise use of the public rights of way, they are acting in a sovereign capacity, and exercising their rights as owners or trustees of public property. The Commission's Title I authority does not give it authority to preempt state or local government property rights, or authority to regulate the use of public rights-of-way generally.

- Nor does the Commission have "any additional basis for preempting such regulations" (NPRM ¶ **98).** Given the Commission's classification of cable modem service as a non-cable, non-telecommunications service, there is no additional basis for preemption. The provisions to which the Commission points as potential sources of preemptive authority actually protect local authority over cable modem service.

- Even if the Commission had broad preemption authority over other forms of State and local regulation that would "limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory environment" (NPRM ¶ 99), it should not use that authority to preempt specific state laws or local regulations. Local govemments are promoting the deployment of cable modem facilities and promoting the development of broadband applications that will encourage use of cable modem facilities.

- The Commission's classification of cable modem service as an interstate information service (NPRM ¶ 102) leaves local governments free, inter alia: to require franchises for non-cable services to the extent they are not prohibited from doing so by state law; to require rents for use and occupancy of the public rights of way to provide cable modem service to the extent that they are not prohibited from doing so by state law; and to regulate the public rights-of-way and apply other requirements of local law (zoning classifications, etc.) to providers of cable modem service.

- The provision of cable modem service does place substantial additional burdens on public rights-of-way (NPRM ¶ 102). The existing franchising process allows localities to protect their interests by requiring additional authorizations before the public rights of way are used or occupied to provide non-cable services.

- Title VI does not preclude local governments from imposing additional requirements on cable modem service (NPRM ¶ 102).

- The Commission tentatively concludes that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service" (NPRM ¶ 102). The Commission's tentative conclusion is correct, although not for the reasons the Commission perhaps imagines. State law, not Title VI, is the source of local franchising authority. Consistent with Title VI, local governments may issue franchises to use and occupy public rights-of-way to provide cable services, and require further authorizations to use and occupy public rights-of-way to provide cable modem service.

- Existing law does authorize localities or states to franchise providers of information services (NPRM ¶ 102). No entity (other than perhaps an abutting property owner) can place permanent facilities in public rights-of-way without obtaining a state or local authorization to use and occupy the public rights-of-way. In some states, certain providers may be excepted from local franchising requirements (and instead may need to obtain a state authorization), but in most cases the exceptions are limited to common carriers providing telephone and telegraph services, or specified utilities with an obligation to provide uniform, universal service.

- There is no reason to permit a cable operator to avoid franchise or fee requirements that could be applied to an entity that uses and occupies the public rights-of-way to provide only an information service (NPRM ¶ 102).

- Local government actions have not delayed or prevented the deployment of cable modem services (NPRM ¶ 104). Cable modem service is widely deployed, and has obviously prospered under local government regulation.

- The NPRM's tentative conclusion that revenue from cable modem service "would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined" (NPRM ¶ 105) is incorrect. Among other things, cable modem service, as the Commission describes it, is a bundle of services which includes cable service. Under the Cable Act, because the service includes some cable services, revenues from the service are subject to a franchise fee under 47 U.S.C. § 542(b).

- Further, Title VI preserves local authority to impose fees on non-cable services. It does not need to provide "an independent basis" for assessing franchise fees on non-cable services provided by the cable operator; state and local law can (and in many cases does) provide that authority (NPRM ¶ 105)

- Disputes related to fees on cable modem service going forward do not implicate a national policy, and do not require a uniform national response, even assuming cable modem service is not a cable service (NPRM ¶ 107). At least pre-1996 franchises are grandfathered, so that there is no question franchise fees can be collected on cable modem service under those franchises. Going forward, authority to charge a fee on cable modem service would be a function of state and local law, and any disputes are best resolved by state courts.

- It is not appropriate for the Commission to exercise its jurisdiction under Section 622, as there is no real issue with respect to past fees, even assuming for the sake of argument that there are limits on local authority going forward (NPRM ¶ 107). State law can effectively resolve any disputes that arise, and the disputes are not likely to lend themselves to uniform resolution.

- The "authority conferred on franchising authorities by section 632(a) of the Communications Act to establish and enforce customer service requirements" does in fact apply to cable modem service provided by a cable operator (NPRM ¶ 108). But local authority to regulate customer service standards does not depend on "authority conferred" by Section 632. States and localities have independent authority outside of Title VI to protect consumers.

- The provisions of Section 632(d) do apply to cable modem service (NPRM ¶ 108). There is no specific preemption of regulation of customer service regulations of cable modem service under Title VI.

- Cable modem service in included in the category of "other service" for purposes of section 631 [the privacy provisions of Title VI] (NPRM ¶ 112). Section 631 also protects local authority to establish privacy requirements.

- Cable operators can and do exercise substantial control over cable modem service (NPRM ¶ 87).

- The Communications Act requires regulatory disparity, not parity in the treatment of common carriers and cable systems (NPRM ¶ 85.) Hence, regardless of the desirability of "regulatory parity," the result in this rulemaking cannot be driven by that goal.

- There are no statutory provisions or congressional goals that would be furthered by the Commission's exercise of ancillary jurisdiction over cable modem service (NPRM ¶ 79).

The Commission has no legal authority for preempting local authority over cable modem service. Nor does the Commission have any factual justification for such an action. And Commission action in this field would not only raise fundamental issues of federalism, but would interfere with the ability of local governments to perform vital tasks that the federal government is either ill-equipped or simply not empowered to perform. Thus, federal preemption would actually harm the interests not only of local governments, but of society at large. The Commission must not lose sight of the fact that local officials have the best interests of their communities at heart and have absolutely no reason to interfere with the deployment of cable

modem services. For all these reasons, ALOAP urges the Commission to refrain from any action that would affect local authority regarding cable modem services.

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